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KEEPING WETLANDS WET: ARE EXISTING PROTECTIONS ENOUGH?

Kim Diana Connolly^{*†}

TABLE OF CONTENTS

I. Introduction	169
II. Discussion	170
A. Why Do We Care? Wetlands Functions and Values.....	170
B. Introduction to the Clean Water Act Section 404 Wetlands Regulatory Framework.....	173
C. Areas and Activities Currently Subject to Section 404 Jurisdiction	175
III. Conclusion: What Steps Can We Take to Protect Wetlands?.....	190

I. INTRODUCTION

Recent years have seen reinterpretation and reworking of the measures used by the federal government to protect wetlands. Consequently, federal oversight of certain wetlands and certain wetland activities has been substantially reduced. The Bush Administration has taken action that could further limit federal control of activities in wetlands. As a result, existing protections are not enough to maintain the crucial functions and values that the nation's wetlands provide to United States citizens. Action must be taken soon if wetlands are to be saved.

* Asst. Prof. of Law, Univ. of South Carolina School of Law; Dir., Environmental Law Clinic; Assoc. Faculty, Univ. of South Carolina School of the Env't. J.D. 1993, Georgetown Univ. Law Center. The author can be reached at connolly@law.sc.edu. The author appreciates the helpful comments on earlier drafts from Robin Mann, F. James Cumberland, Jr., and Roy Stuckey. The author also thanks Cynthia Jones for her diligent research assistance in preparing these remarks. This write-up is based on a July 15, 2003, presentation as part of Vermont Law School's Summer 2003 "Hot Topics in Environmental Law" Lecture Series.

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This article begins by discussing the importance of wetlands and by providing a brief overview of Clean Water Act (“CWA”) Section 404. It continues by analyzing the current interpretations of both the breadth of Section 404 jurisdiction and the activities regulated under Section 404. The article concludes by recommending measures for strengthening wetlands protections in light of these narrowed interpretations.

II. DISCUSSION

A. *Why Do We Care? Wetlands Functions and Values*

Wetlands provide many services, often labeled “functions and values.”¹ These include but are not limited to: habitat provision, water quality improvement, flood protection, biological productivity, recreational, educational, and research opportunities.²

Wetlands provide crucial food and habitat to many species including—mammals, birds, fish, amphibians, reptiles, insects, mollusks, and crustaceans.³ The U.S. Fish & Wildlife Service has estimated that up to forty-three percent of species listed by the federal government as threatened or endangered rely on wetlands for their survival.⁴

1. See generally Nat’l Acad. of Sciences, Nat’l Research Council, *Wetlands: Characteristics and Boundaries* (1995), available at <http://www.nap.edu/books/0309051347/html/index.html> (last visited July 25, 2003); U.S. Army Corps of Engineers (“Corps”), *Wetland Functions and Values*, available at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/techbio.htm> (last visited July 25, 2003); Environmental Protection Agency (“EPA”), *Functions and Values of Wetlands*, available at http://www.epa.gov/owow/wetlands/fun_val.pdf (last visited July 25, 2003). See also North Carolina State Univ. Quality Group (“NCSU”), *Values of Wetlands*, at <http://h2osparc.wq.ncsu.edu/info/wetlands/values.html> (last visited July 25, 2003); Iowa Dept. of Agric., Soil Conservation Serv., *Iowa Wetland Restoration and Conservation Plan*, Chapter 4: *Functions and Values of Wetlands and Riparian Areas*, at <http://www.ag.iastate.edu/centers/iawetlands/download.html> (last visited July 25, 2003); The Izaak Walton League, *American Wetlands Campaign Kit: Wetlands Ecology Functions and Values*, at http://www.iwla.org/SOS/awm/kit_ecol.html (last visited July 25, 2003).

2. See *infra* nn. 2-18 and accompanying text.

3. “Many animals need wetlands for part or all of their life-cycles. In late winter and early spring, for example, adult tiger salamanders migrate from uplands to vernal pools for breeding . . .” William S. Sipple, *Wetland Functions and Values*, available at <http://www.epa.gov/watertrain/wetlands/text.html> (last visited July 25, 2003). Once larvae develop lungs, they leave the vernal pools to live as adults in adjacent upland. In other words, tiger salamanders depend on a combined area of wetlands and uplands to exist. *Id.*

4. U.S. Geological Survey, *The Importance of Wetlands*, at http://www.glsc.usgs.gov/_files/publications/factsheets/wetlands00/wetlands00.htm (last visited Dec. 5, 2003). See also U.S. Fish & Wildlife Service (“FWS”), EPA, Nat’l Marine Fisheries Serv., Natural Resources Conservation Serv. Corps, *Status and Trends of Nation’s Wetlands*, available at <http://wetlands.fws.gov/bha/SandT/download>

Wetlands can also receive, store, and release water in various ways, thereby improving water quality. For example, wetlands: intercept surface runoff; remove or retain inorganic nutrients thereby decreasing biological oxygen demand; remove suspended solids and organic wastes; and reduce certain metals and pathogens.⁵

At the same time, some wetlands act as reservoirs, maintaining stream flow and lake levels during dry periods; others replenish groundwater.⁶ Wetlands also store and slowly release surface water, rain, snowmelt, groundwater, and floodwaters.⁷ Trees and other wetland vegetation impede floodwater movement and distribute water slowly over floodplains, thus serving to minimize or eliminate damage to other areas.⁸ Wetlands even improve water quality by protecting shorelines and stream banks against erosion.⁹ Wetlands also play a role in atmospheric maintenance.¹⁰ Even so-called "isolated" wetlands perform many important functions and values.¹¹

The biological productivity of wetlands generate and support a variety of products used by humans, such as timber sold in interstate commerce.¹² Similarly, wetlands support numerous plants such as blueberries, cranberries, mints, and wild rice.¹³ Many medicines are derived from

d/SandTPaper.pdf (last visited July 25, 2003) ("Many of the Nation's endangered and threatened species are dependent on wetlands . . .").

5. NCSU, *supra* note 1.

6. *Id.* at 2-3.

7. *Id.* at 3-4.

8. Sipple, *supra* note 3, at 4. "This combined water storage and slowing action lowers flood heights and reduces erosion downstream and on adjacent lands. It also helps reduce floods and prevents waterlogging of agricultural lands. Wetlands within and downstream of urban areas are particularly valuable in this regard, counteracting the greatly increased rate and volume of surface-water runoff from pavement and buildings." *Id.*

9. NCSU, *supra* note 1, at 3. See also Sipple, *supra* note 3, at 5 (stating "[w]etland plants hold the soil in place with their roots, absorb the energy of waves, and break up the flow of stream or river currents.").

10. Sipple, *supra* note 3.

11. "The profiles of isolated wetlands presented in this report show that many of the functions and benefits (e.g., water storage, nutrient retention and cycling, sediment retention, and wildlife habitat) ascribed to non-isolated wetlands are performed by isolated wetlands. Moreover, their geographic isolation and local and regional distribution place isolated wetlands in a rather unique position to provide habitats crucial for the survival of many plant and animal species (e.g., endemism and breeding grounds for numerous amphibian and bird species). Isolated wetlands are vital natural resources, important for maintaining the Nation's biodiversity and wetland-dependent wildlife and for providing a host of other functions." R. W. TINER, H. C. BERGQUIST, G. P. DEALESSIO, AND M. J. STARR, U.S. DEPT. OF THE INTERIOR, FISH & WILDLIFE SERVICE, GEOGRAPHICALLY ISOLATED WETLANDS: A PRELIMINARY ASSESSMENT OF THEIR CHARACTERISTICS AND STATUS IN SELECTED AREAS OF THE UNITED STATES (June 2002), available at http://wetlands.fws.gov/Pubs_Reports/isolated/report.htm at Executive Summary (last visited July 25, 2003).

12. Sipple, *supra* note 3.

13. *Id.*

wetland soils and plants.¹⁴ The fishing and shellfishing industries, particularly recreational angling, harvest many wetland-dependent species (e.g., striped bass and brown shrimp).¹⁵

Wetlands foster diverse recreational, educational and research opportunities with significant economic impacts. For example, more than half of all United States adults (98 million people) hunt, fish, watch birds or photograph wildlife; they spend about \$59.5 billion per year undertaking these activities.¹⁶ In 1991, it is estimated birdwatchers alone spent \$5.2 billion, much of it associated with wetlands.¹⁷ Three million migratory bird hunters generate \$1.3 billion annually in retail sales, with a total economic multiplier effect of \$3.9 billion, which is further associated with 46,000 additional jobs, and sales and income tax revenues of \$176 million.¹⁸ Harvests of fur and reptile skins associated with wetlands species are also multi-billion dollar industries.¹⁹

The science of wetlands is rich and diverse.²⁰ In light of all these diverse functions and values, many educators and scientists use wetlands as learning laboratories.²¹ The United States Army Corps of Engineers ("Corps") sponsors federal scientific research regarding wetlands generally through the Waterways Experiment Station's Environmental Laboratory.²² In addition, the Association of State Wetlands Managers has put together an excellent scientific bibliography exploring the functions and values of isolated wetlands because they perform many crucial functions and values.²³

14. NCSU, *supra* note 1.

15. Sipple, *supra* note 3.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* See also NCSU, *supra* note 1.

20. See, e.g., FWS, Nat'l Wetlands Inventory, Reports and Public'ns, *List of Selected Wetland Publications*, at http://wetlands.fws.gov/Pubs_Reports/Other_Pubs/PUBLISTS2.pdf (last visited July 25, 2003).

21. See, e.g., Univ. of Florida Extension, *Florida Wetland Education*, at <http://wetlandextent> See, e.g., Univ. of Florida Extension, *Florida Wetland Education*, at <http://wetlandextension.ifas.ufl.edu/education.htm> (last visited July 25, 2003); Univ. of Texas at Austin Marine Science Institute, Wetlands Education Center, at <http://www.utmsi.utexas.edu/outreach/wetlands/> (last visited July 25, 2003); Texas Parks and Wildlife, *Exploring Texas: Understanding Wetlands*, at <http://www.tpwd.state.tx.us/exp/ltx/efl/nasa/wetlands.htm> (last visited July 25, 2003); 4-H Wetland Wonders, available at <http://www.national4-hheadquarters.gov/curricul/dbd20.htm> (last visited July 25, 2003).

22. See Corps, *Wetland Publications*, at <http://www.wes.army.mil/el/wetlands/wlpubs.html> (last visited July 25, 2003) (providing a list of wetlands publications).

23. Assoc. of State Wetland Managers ("ASWM"), *Isolated Wetlands Bibliography*, at <http://www.aswm.org/science/isolated.htm> (last visited July 25, 2003). For a good overview of the functions and values associated with isolated wetlands, see Southern Env'tl. Law Center: *At Risk: South*

Given the importance of wetlands on so many levels, it would stand to reason that the federal government should provide strong protections for these valuable areas. Sadly, this is not the case. The following section will discuss the federal framework for wetlands protection.²⁴

B. Introduction to the Clean Water Act Section 404 Wetlands Regulatory Framework

The U.S. does not have a single, comprehensive law providing protection for wetlands. A number of federal laws bear upon wetlands, including: laws to address agricultural wetlands;²⁵ incentives to encourage preservation of wetlands through the Wetlands Reserve Program;²⁶ and programs that protect specific wetlands located on federally-controlled lands like National Wildlife Refuges.²⁷ Far and away, the most important federal program in terms of wetlands regulation is the permitting program under Section 404 of the CWA.²⁸ Under this program, close to 90,000 activities in wetlands and other jurisdictional waters of the U.S. receive federal review each year.²⁹ It is the breadth of this permitting program that has been diminished in recent years.³⁰

Carolina's Isolated Wetlands, available at http://www.selcga.org/Cases/sc_wetlands/atrisk_report.pdf (last visited Feb. 12, 2004).

24. See ASWM, *State Wetland Protection Statutes*, at <http://www.aswm.org/swp/states.htm> (last visited July 25, 2003) (It is important to note that some states have certain measures in place to provide a level of protections for wetlands). See also WILLIAM L. WANT, *LAW OF WETLANDS REGULATION*, Ch. 13: *State Wetlands and Coastal Laws* (2002).

25. Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1404 (1985), amended by Pub. L. No. 101-624, 104 Stat. 3587 (1990), reauthorized by Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002) (It uses incentives and disincentives to protect wetlands on agricultural lands. For example, under the Swampbuster program, conversion of natural wetlands to cropland makes a farmer ineligible for federal program benefits.). See generally Jeffrey Zinn, Cong. Research Serv., CRS Report RL31486, *Resource Conservation Title of the 2002 Farm Bill: A Comparison of New Law with Bills Passed by the House and Senate and Prior Law* (2002).

26. See generally 7 C.F.R. pt. 1467 (2002), available at <http://www.nrcs.usda.gov/programs/wr/p/> (last visited July 25, 2003).

27. See, e.g., FWS, Sherburne National Wildlife Refuge, *Wetlands*, at <http://midwest.fws.gov/Sherburne/Wetlands.htm> (last visited July 25, 2003).

28. 33 U.S.C. § 1344 (2000).

29. Corps, *All Permit Decisions FY 2002*, at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2002webcharts.pdf> (last visited July 25, 2003).

30. See WANT, *supra* note 24 (for general information on the CWA Section 404 permitting program); MARGARET N. STRAND, *WETLANDS DESKBOOK*, (Environmental Law Institute, 2d Ed., 1997). See also United States Environmental Protection Agency Office of Wetlands, Oceans and Watersheds, at <http://www.epa.gov/owow/wetlands> (last visited July 25, 2003); Corps Regulatory Program, at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/> (last visited July 25, 2003).

The 1972 Amendments to the Federal Water Pollution Control Act³¹ created what commonly is called Section 404 authority.³² The overall congressional intent for what has come to be called the CWA³³ was to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³⁴

The relevant portion of Section 404(a) reads as follows: “[t]he Secretary [of the Army] may issue permits for the discharge of dredged or fill material into the navigable waters.”³⁵ Thus, in order to determine if a permit is required, an assessment must be made as to whether: (1) dredged³⁶ or fill³⁷ material; (2) is being “discharged;” (3) into “navigable” waters.³⁸ The definitions of these latter two requirements have come under recent fire.³⁹

Congress designed a shared responsibility for Section 404 implementation between the Corps and the newly created Environmental Protection Agency (“EPA”).⁴⁰ The Corps’ Regulatory Branch administers Section 404 permitting and day-to-day activities,⁴¹ while EPA has an

31. Pub. L. No. 92-500, 86 Stat. 816 (1972), as codified in 33 U.S.C. §§ 1251-1387 (2000), further amended in Pub. L. No. 95-217, 91 Stat. 1567 (1977); Pub. L. No. 100-4, 101 Stat. 45 (1987) (Section 404 of the CWA again was amended in 1987 to modify criminal and civil penalty provisions and to add an administrative penalty provision).

32. See EPA, *Section 404 of the Clean Water Act: An Overview*, at <http://www.epa.gov/owow/wetlands/facts/fact10.html> (last visited July 25, 2003).

33. “SEC. 518. This Act may be cited as the ‘Federal Water Pollution Control Act’ (commonly referred to as the Clean Water Act).” Pub. L. No. 95-217, 91 Stat. 1566 (1977).

34. 33 U.S.C. § 1251(a) (2000).

35. 33 U.S.C. § 1344(a) (2000).

36. “[D]redged” material is defined in the regulations as “material that is excavated or dredged from waters of the United States.” 33 C.F.R. § 323.2(c) (2002).

37. See Dept. of the Army, Corps and EPA, *Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,”* 67 Fed. Reg. 31,129 (2002) (“Fill” material, a matter of recent controversy is now redefined); 33 C.F.R. § 323.2(e) (2002) (“material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States. (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States. (3) The term fill material does not include trash or garbage”).

38. 33 U.S.C. § 1311(a) (2000).

39. See *infra* section III.

40. STRAND, *supra* note 30, at 8.

41. See Corps, *Regulatory Program*, at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg> (last visited July 25, 2003); Corps, *Regulatory Program*, at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/boundmap.pdf> (last visited July 25, 2003) (The Corps has eight divisions, also called Regional Business Centers, throughout the U.S., Asia, and Europe as well as field offices in other locations worldwide. The Corps divisions and districts follow watershed boundaries, not state boundaries, so states are sometimes divided into several divisions/districts).

oversight and enforcement role.⁴² Other federal agencies (such as FWS and the National Marine Fisheries Service) are involved in permitting decisions by lending expertise otherwise not available.⁴³ States also play a role in the permitting process, primarily through CWA Section 401⁴⁴ water quality certifications and, if required,⁴⁵ through Coastal Zone Management Act⁴⁶ certification.

Although Congress did not mention wetlands specifically in the CWA, the Corps and EPA have interpreted it to provide authority over those areas.⁴⁷ The Corps defines “wetlands” in its regulations as: [T]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”⁴⁸ Thus, in order to determine whether an area is a wetland, its hydrology, vegetation, and soil characteristics must be assessed.⁴⁹

Permits are required for most activities in wetlands over which the Corps and EPA have jurisdiction.⁵⁰ The interesting question explored in the next section of these remarks is the areas and activities over which the Corps and EPA have jurisdiction.

C. Areas and Activities Currently Subject to Section 404 Jurisdiction

Because Congress elected to provide such a broad grant of authority to the Corps and EPA, implementation of section 404 largely has been a creature of administrative and judicial interpretation. This situation is not uncommon in environmental law; section 404 contains approximately 3800

42. See EPA, Wetlands, at <http://www.epa.gov/owow/wetlands/facts/fact10.html> (last visited July 25, 2003).

43. See Corps, *Regulatory Program: Working with Other Agencies*, at http://www.usace.army.mil/inet/functons/cw/cecwo/reg/other_agncy.htm (last visited July 25, 2003).

44. 33 U.S.C. § 1341 (2000).

45. See also Nat’l Oceanic and Atmospheric Admin., *State and Territory Coastal Management Program Summaries*, at <http://coastalmanagement.noaa.gov/czm/czmsitelist.html> (last visited July 25, 2003) (for links to state programs and related requirements).

46. 16 U.S.C. §§ 1451–1465 (2000).

47. 33 C.F.R. § 323 (2002).

48. 33 C.F.R. § 328.3(b) (2002).

49. See Corps, *Corps of Engineers Wetlands Delineation Manual* (1987), available at <http://www.wes.army.mil/el/wetlands/pdfs/wlman87.pdf> (last visited July 25, 2003) (such an assessment is done using the 1987 Wetlands Delineation Manual).

50. See 33 U.S.C. § 1344(f)(2)(A) (2000); 33 C.F.R. § 323.3 (2002); 33 C.F.R. § 323.4 (2002) (some activities are automatically exempt from permitting requirements under the statutes and regulations, including normal farming, silviculture and ranching activities, certain maintenance, farm or stock ponds, temporary sedimentation basins on construction sites, farm roads, etc.).

words actually enacted by Congress, which are supplemented by about a dozen regulatory sections⁵¹ as well as multiple guidance documents,⁵² memoranda of agreement,⁵³ other regulatory documents,⁵⁴ and hundreds of judicial decisions.⁵⁵ Likewise, section 9 of the Endangered Species Act,⁵⁶ which among other things prevents the “taking” of any listed species,⁵⁷ contains just over 1600 words enacted by Congress, but is similarly supplemented by regulatory sections,⁵⁸ multiple guidance documents,⁵⁹ policy statements,⁶⁰ and hundreds of judicial decisions.⁶¹

As noted above, Section 404(a) requires permits for “the discharge of dredged or fill material into the navigable waters at specified disposal sites.”⁶² This section will explore more fully how the Corps and EPA have construed the terms “navigable waters” and “discharge” in implementing the responsibilities given to them by Congress through Section 404.

1. What Are “Waters of the United States?” What Is the Extent of Jurisdiction over “Navigable Waters?”

Although there was already a rich body of regulation and case law defining the term “navigable waters”⁶³ under the Rivers and Harbors Act of 1899,⁶⁴ Congress provided a different definition to the term in the CWA.⁶⁵

51. See 33 C.F.R. §§ 320, 323, 325–328, 330–331 (2002); 40 C.F.R. §§ 22, 230, 233 (2002).

52. Corps, *Regulatory Guidance Letters*, available at <http://www.usace.army.mil/inet/function/s/cw/cecwo/reg/rglsindx.htm> (last visited July 25, 2003).

53. Corps, *Regulatory Program; MOU/MOAs*, available at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/moumoas.htm> (last visited July 25, 2003).

54. See, e.g., EPA and Corps, *Application of Best Management Practices to Mechanical Silvicultural Site Preparation Activities for the Establishment of Pine Plantations in the Southeast* (1995), available at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/silvicul.htm> (last visited July 25, 2003).

55. 33 U.S.C. § 1344 (2000).

56. 16 U.S.C. § 1538 (2000).

57. *Id.* at § 1538(a)(1)(B)–(C).

58. 50 C.F.R. pt. 17 (2002).

59. FWS, *Endangered Species Related Laws, Regulations, Policies & Notices*, available at <http://endangered.fws.gov/policies/index.html> (last visited July 25, 2003).

60. *Id.*

61. 16 U.S.C.A. § 1538 (West 2002).

62. 33 U.S.C. § 1344(a) (2000).

63. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1 (1824); *The Daniel Ball*, 77 U.S. 557 (1871); *U.S. v. The Montello*, 87 U.S. 430 (1874); *Citizens Comm. for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2nd Cir. 1970); *Hart and Miller Islands Area Envtl. Group, Inc. v. Corps of Engineers of the U.S. Army*, 621 F.2d 1281 (4th Cir. 1980); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921); *Leslie Salt Co. v. Froehke*, 578 F.2d 742 (9th Cir. 1978).

64. 33 U.S.C. §§ 401, 403, 404 (2000).

65. The Supreme Court noted the significance of this action in 1985 by stating “[i]n adopting this definition of ‘navigable waters,’ Congress evidently intended to repudiate limits that had been

That statute defines the term “navigable waters” to mean “the waters of the United States, including the territorial seas.”⁶⁶

In 1975, shortly after Congress passed the CWA, the Natural Resources Defense Council challenged the extent of this jurisdiction.⁶⁷ The District of Columbia District Court declared in a very short opinion that “Congress by defining the term ‘navigable waters’ . . . to mean ‘the waters of the United States, including the territorial seas,’ asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution.”⁶⁸ During the subsequent 1977 reauthorization of the CWA, Congress further debated the proper extent of the Corps’ jurisdiction.⁶⁹ As the Supreme Court summarized in a later case, “the legislation as ultimately passed, in the words of Senator Baker, ‘retain[ed] the comprehensive jurisdiction over the Nation’s waters exercised in the 1972 Federal Water Pollution Control Act.’”⁷⁰

The current Corps regulatory definition of “waters of the United States” is a result of these court directives.⁷¹ In basic terms, there must be some connection between the use of the waters and interstate commerce in order for the Corps to claim regulatory authority.⁷² Under the regulations, the

placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” See S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33,756–33,757 (1972) (statement of Rep. Dingell); *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

66. 33 U.S.C. § 1362 (2000).

67. *NRDC v. Calloway*, 392 F. Supp. 685 (D.D.C. 1975).

68. *Id.* at 686.

69. 123 CONG. REC. at 10426–10432 (1977); 123 CONG. REC. at 26710–26729 (1977).

70. *Riverside Bayview Homes*, 474 U.S. at 137; “Proponents of a more limited § 404 jurisdiction contended that the Corps’ assertion of jurisdiction over wetlands and other non-navigable ‘waters’ had far exceeded what Congress had intended in enacting § 404. Opponents of the proposed changes argued that a narrower definition of ‘navigable waters’ for purposes of § 404 would exclude vast stretches of crucial wetlands from the Corps’ jurisdiction, with detrimental effects on wetlands ecosystems, water quality, and the aquatic environment generally. The debate, particularly in the Senate, was lengthy. In the House, the debate ended with the adoption of a narrowed definition of ‘waters’; but in the Senate the limiting amendment was defeated and the old definition retained. The Conference Committee adopted the Senate’s approach: efforts to narrow the definition of ‘waters’ were abandoned . . .” *Id.* at 136–137.

71. See generally 33 C.F.R. § 328 (2002).

72. The definition as it appears in full in the regulations reads as follows: “The term ‘waters of the United States’ means:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows,

Corps claims jurisdiction over use, degradation, or destruction of any wetlands “by interstate or foreign travelers for recreational or other purposes”⁷³ or “[f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce”⁷⁴ or “[w]hich are used or could be used for industrial purpose by industries in interstate commerce.”⁷⁵

The Corps also claims jurisdiction over wetlands “adjacent” to other waters of the United States with connections to interstate commerce.⁷⁶ In 1985, the Supreme Court interpreted this concept of adjacency in *Riverside Bayview Homes* as meaning bordering, contiguous, or neighboring, even if separated by human-made or natural dikes or barriers.⁷⁷ In upholding the Corps’ claim of jurisdiction, the Court noted that “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined.”⁷⁸

playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

- (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1)–(4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)–(6) of this section.
- (8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal Agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.” 33 C.F.R. § 328.3(a) (2002).

73. *Id.* at § 328.3(a)(3)(i).

74. *Id.* at § 328.3(a)(3)(ii).

75. *Id.* at § 328.3(a)(3)(iii).

76. *Id.* at § 328.3(a)(7).

77. *Riverside Bayview Homes*, 474 U.S. at 122, (White, J., delivered the unanimous decision for the Court on petition from the Sixth Circuit).

78. *Id.* at 133. The Court held “we therefore conclude that a definition of ‘waters of the United States’ encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act. Because respondent’s property is part of a wetland

The *Riverside Bayview* decision, however, specifically noted that the Court was “not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water.”⁷⁹ It thus left open the question as to the jurisdiction over so-called “isolated” wetlands.⁸⁰

The Corps and EPA, taking seriously their Congressional responsibility for protecting waters of the U.S. as far as the Commerce Clause allows, thereafter provided the regulated community with guidelines for how they would manage such isolated areas. The Corps and EPA identified a body of water’s use (or potential use) as migratory bird habitat to satisfy the interstate commerce connection.⁸¹ These agencies believed waters that are or may be used as habitat for migratory birds are examples of waters whose use, degradation, or destruction could affect interstate or foreign commerce.⁸² Therefore, those waters must be regulated as “waters of the United States.”⁸³ These explanations became known as the “Migratory Bird Rule.”⁸⁴ For a number of years, the Migratory Bird Rule was upheld as a viable interpretation under existing law by those district and circuit courts who gave substantive consideration to the rule itself.⁸⁵ Following a 1997 Fourth Circuit decision in a criminal case that called into question the

that actually abuts on a navigable waterway, respondent was required to have a permit in this case.” *Id.* at 135.

79. *Id.* at 131 n.8.

80. The recent FWS report on isolated wetlands discusses the difficulty in defining this term by noting that “[t]he term ‘isolated’ is a relative term. There is no single, ecologically or scientifically accepted definition of isolated wetland because this issue is more a matter of perspective than scientific fact. Nonetheless, it is a question of particular relevance for wetlands since it may affect their future well-being. *Webster’s New World Dictionary of the American Language* (Guralnik 1972) defines ‘isolate’ as ‘to set apart from others; place alone.’ An isolated wetland, therefore, would be one that is separated from other wetlands or other waters – standing alone. Isolation can be viewed from a number of perspectives. Two common viewpoints are based on landscape or geomorphic differences and hydrologic interactions. Others may consider ecological relationships.” TINER, ET AL., *supra* note 11, at Section 2: Overview of Isolated Wetlands.

81. Corps, Dept. of the Army, *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41,217 (1986) (codified at 33 C.F.R. §§ 320–330); Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,765 (1988) (codified at 40 C.F.R. §§ 232–233).

82. *Id.*

83. *Id.*

84. *Leslie Salt Co. v. U.S.*, 896 F.2d 354 (1990), *cert. denied*, 498 U.S. 1126 (1991).

85. See e.g., *Leslie Salt Co.*, *supra* note 84 (Ninth Cir. upheld the Migratory Bird Rule); *Hoffman Homes v. EPA*, 999 F.2d 256 (7th Cir. 1993) (Seventh Cir. upheld the rule); *Tabb Lakes v. US*, 715 F. Supp. 726 (E.D. Va. 1988), *aff’d without opinion*, 885 F.2d 866 (4th Cir. 1989) (the Migratory Bird Rule was ruled invalid in the Fourth Cir. in 1989 for failure to follow the Administrative Procedure Act required notice and comment procedures).

Commerce Clause authority for wetlands regulations,⁸⁶ however, attacks on the Migratory Bird Rule were renewed.

Solid Waste Agency of No. Cook County v. U.S. Army Corps of Engineers (“*SWANCC*”),⁸⁷ redirected jurisprudence in this area in early 2001. In a 5-4 ruling, the Supreme Court held improper the Corps’ and EPA’s claims of jurisdiction based solely on actual or potential use of a water of the United States by migratory birds. This case involved statutory and constitutional challenges to the assertion of CWA jurisdiction over isolated, non-navigable, intrastate waters used as habitat by 121 species of migratory birds. *SWANCC*, a consortium of suburban Chicago municipalities, wanted to develop a solid waste disposal site in a 533-acre parcel that was formerly a gravel mining pit.⁸⁸ The pit had reverted into a successional stage forest with seasonal and permanent ponds, but it was not a delineated wetland.⁸⁹ *SWANCC* purchased the site and applied for a Section 404 permit, which the Corps subsequently denied.⁹⁰

SWANCC then sued the Corps, claiming that: 1) the Migratory Bird Rule was beyond their jurisdiction as granted by Congress and 2) Congress lacked authority under the Commerce Clause to grant the Corps such

86. U.S. v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) (a divided panel of the Fourth Cir. concluded “that 33 CFR 328.3(a)(3) (1993) (defining waters of the United States to include those waters whose degradation ‘could affect’ interstate commerce) is unauthorized by the CWA as limited by the Commerce Clause and therefore is invalid *Id.* at 253–254.”); See Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *United States v. James J. Wilson* (May 1998), available at <http://www.epa.gov/earth1r6/6en/w/wilguid.pdf> (last visited July 25, 2003). The Corps and EPA issued guidance following the *Wilson* decision. It limited the *Wilson* holding to the Fourth Cir., stating that “within the five states comprising the Fourth Cir., the Corps and EPA will adhere to the holdings of law in the *Wilson* decision. At the same time, within the Fourth Cir. states, both the Corps and EPA will continue to assert CWA jurisdiction over any and all isolated water bodies, including isolated wetlands, based on the CWA statute itself, where (1) either agency can establish an *actual* link between that water body and interstate or foreign commerce and (2) individually and/or in the aggregate, the use, degradation or destruction of isolated waters with such a link would have a substantial effect on interstate or foreign commerce. This approach addresses the concerns of the Fourth Cir. regarding jurisdiction over these waters.” *Id.*

87. *Solid Waste Agency of No. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 121 S. Ct. 675 (2001). *SWANCC* was the second case the Supreme Court had ever heard on Section 404 jurisdiction matters. Copies of parties’ briefs as well as the transcript of the oral argument are available at <http://www.swancc.org> (last visited July 25, 2003).

88. *Id.*

89. *Id.*

90. The reasons for the permit denial were that (1) *SWANCC* had not established that the proposal was the least harmful practicable alternative; (2) the fact that *SWANCC* failed to set aside funds for leak remediation was unacceptable risk to public drinking water supplies; and (3) the impact to the waters was unmitigable because a landfill cannot be redeveloped into forested habitat. *Id.* at 165. The Corps and EPA had prevailed in the federal district and circuit courts. See *SWANCC*, 91 F.3d 845 (7th Cir. 1999).

jurisdiction.⁹¹ A majority of the Supreme Court agreed, and effectively limited the agencies' approach to asserting jurisdiction under the statute while sidestepping the Commerce Clause challenge.⁹² The dissent argued that the CWA's ambitious and comprehensive goals coupled with the new, expansive definition of navigable waters, meant that Congress had intended expansive jurisdiction pursuant to its Commerce Clause powers under the CWA such that the Migratory Bird Rule should be upheld.⁹³

For two years after the United States Supreme Court issued *SWANCC*, the Corps and EPA offered no official guidance as to how to interpret the decision in the field.⁹⁴ Finally, on January 15, 2003, the EPA and Corps published a "Joint Memorandum" to provide guidance with respect to jurisdictional issues after *SWANCC*.⁹⁵ The Memorandum did little but state the obvious: namely, that "*SWANCC* squarely eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the

91. *SWANCC*, 998 F. Supp. 946 (N.D. Ill. 1998), *aff'd* 191 F.3d 845 (7th Cir. Ill. 1999), *rev'd* 531 U.S. 159 (2001).

92. Specifically, the decision held that "33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 Fed. Reg. 41,217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA." *SWANCC*, 531 U.S. at 174. Many observers anticipated that the decision in the case would rest on Commerce Clause analysis, the Court side-stepped that issue, and based its analysis on the authority granted to the Corps and EPA under the CWA. *Id.* ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. [Citation omitted.] This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. *See id.* This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. [Citation omitted.]"). *Id.* at 172-173.

93. "Because of the statute's ambitious and comprehensive goals, it was, of course, necessary to expand its jurisdictional scope. Thus, although Congress opted to carry over the traditional jurisdictional term 'navigable waters' from the RHA and prior versions of the FWPCA, it broadened the definition of that term to encompass all "waters of the United States." 33 U.S.C. § 1362(7). Indeed, the 1972 conferees arrived at the final formulation by specifically deleting the word 'navigable' from the definition that had originally appeared in the House version of the Act. The majority today undoes that deletion. [footnotes omitted]." *Id.* at 180-181.

94. The Corps and EPA issued a legal interpretation of the case on January 19, 2001 (in the waning days of the Clinton administration). Gary S. Guzy, EPA, Robert M. Andersen, Corps, *Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters*, Jan. 19, 2001, available at <http://www.aswm.org/fwp/swancc/index.htm> (last visited July 25, 2003). That interpretation was the only formal guidance for almost two years following the *SWANCC* decision. In brief, it directed that field staff should no longer rely on the use of waters or wetlands as habitat by migratory birds as the sole basis for the assertion of regulatory jurisdiction under the CWA. *Id.*

95. Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," Appendix A, Joint Memorandum, 68 Fed. Reg. 1995 (Jan. 15, 2003), available at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/ANPRMwaters.pdf> (last visited July 25, 2003).

waters as habitat for migratory birds that cross state lines in their migrations.”⁹⁶ The agencies did, however, set forth a prior-approval standard for many jurisdictional determinations.⁹⁷ At the same time, the guidance said that, “generally speaking,” tributaries would continue to be jurisdictional.⁹⁸ Yet, for the most part, interpretation remains an *ad hoc* determination by the EPA and Corps field staff. After *SWANCC*, it is estimated that at least a quarter, if not more, of the nation’s wetlands are no longer subject to federal regulation.⁹⁹

Many experts from all sides of this issue have weighed in on the ramifications of *SWANCC*.¹⁰⁰ Dozens of law review articles have commented on the matter.¹⁰¹ Congress has held a number of hearings.¹⁰²

96. *Id.* at 1996.

97. “In view of *SWANCC*, neither agency will assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the ‘Migratory Bird Rule.’ In addition, in view of the uncertainties after *SWANCC* concerning jurisdiction over isolated waters that are both intrastate and non-navigable based on other grounds listed in 33 CFR § 328.3(a)(3)(i)–(iii), field staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters, including permitting and enforcement actions.” *Id.* at 1995. Dispute over this guidance was undoubtedly anticipated by the agencies in a footnote that stated: “Therefore, interested person are [sic] free to raise questions and objections about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the law and regulations.” *Id.* at 1996 n.1.

98. *Id.* at 1998.

99. See, e.g., Robert Meltz and Claudia Copeland, Congr. Research Serv., *The Supreme Court Addresses Corps of Engineers Jurisdiction Over “Isolated Waters”: The SWANCC Decision*, Feb. 16, 2001, available at <http://www.ncseonline.org/nle/crsreports/risk/rsk-56.cfm?&CFID=9002231&CFT> (last visited July 25, 2003) (estimating up to 79%); Jon Kusler, ASWM, *The SWANCC Decision and State Regulation of Wetlands*, Mar. 2001 (estimating 30–60%), available at <http://www.aswm.org/fwp/swancc/aswm-int.pdf> (last visited July 25, 2003).

100. *Id.*; Jon Kusler, ASWM, *Model State Statute to Close the Gap Created by SWANCC*, available at <http://www.aswm.org/swp/model-leg.pdf> (last visited July 25, 2003); Ducks Unlimited, *The SWANCC Decision: Implications for Wetlands and Waterfowl* (2001), available at http://www.ducks.org/conservation/404_report.asp (last visited July 25, 2003); U.S. Dept. of the Interior, FWS, *Geographically Isolated Wetlands: A Preliminary Assessment of their Characteristics and Status in Selected Areas of the United States*, (2002), available at http://wetlands.fws.gov/Pubs_Reports/isolated/report.htm (last visited July 25, 2003).

101. See, e.g., Virginia S. Albrecht and Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look At The Legislative History Of The Clean Water Act*, 32 ELR 11042 (2002); Michael S. Greve, *Business, The States, And Federalism’s Political Economy*, 25 Harv. J.L. & Pub. Pol’y 895 (2002); Douglas T. Kendall, et. al., *Conservative Judicial Activism And The Environment: An Assessment Of The Threat*, 32 ELR 10835 (2002); Ross B. Plyler, Note, *Protecting South Carolina’s Isolated Wetlands In The Wake Of Solid Waste Agency*, 53 S.C. L. Rev. 757 (2002); Eric R. Coulson, *Bird Hotels: Are The Resting Spots Of Migratory Birds Entitled To Federal Government Protection Through The Commerce Clause?* Solid Waste Agency Of Northern Cook County v. U.S. Army Corps Of Engineers, 531 U.S. 159 (2001), 26 S. Ill. U. L.J. 575 (2002); Philip Lammens, Note, Section 404(4) Of The Clean Water Act: The Army Corps Of Engineers’ Jurisdiction Over “All Other Waters”, 54 Fla. L. Rev. 147 (2002); Solid Waste Agency v. United States Army Corps Of Engineers, 531 U.S. 159 (2001), 24 U. Ark. Little Rock L. Rev. 329 (2002); Tobias Halvarson, *Solid*

Waste Agency Of Northern Cook County v. United States Army Corps Of Engineers: The Failure Of "Navigability" As A Proxy In Demarcating Federal Jurisdiction For Environmental Protection, 29 Ecology L.Q. 181 (2002); Hans Hull, *Ninth Circuit Court Of Appeals Maintains Broad Clean Water Act Jurisdiction*, 29 Ecology L.Q. 436 (2002); Roderick E. Walston, *The Federal Commerce And Navigation Powers: Solid Waste Agency Of Northern Cook County's Undecided Constitutional Issue*, 42 Santa Clara L. Rev. 699 (2002); Talene Nicole Megerian, *Federal Regulation Of Isolated Wetlands: To Be Or Not To Be*, 13 Vill. Envtl. L.J. 157 (2002); Charles Tiefer, *SWANCC: Constitutional Swan Song For Environmental Laws Or No More Than A Swipe At Their Sweep?*, 31 ELR 11493 (2001); John H. Davidson and Philip P. Chandler, *The Minimal Effects Exemption And The Regulation Of Headwater Wetlands Under Swampbuster: With A Coda On The Theme Of SWANCC*, 31 ELR 11417 (2001); Jamie Y. Tanabe, *The Commerce Clause Pendulum: Will Federal Environmental Law Survive In The Post-SWANCC Epoch Of "New Federalism"?*, 31 Envtl. L. 1051 (2001); William F. Northrip, Note, *Running Aground On The (Shoal) "Waters Of The United States": The Supreme Court Invalidates The Migratory Bird Rule Solid Waste Agency Of Northern Cook County V. United States Army Corps Of Engineers*, 66 Mo. L. Rev. 903 (2001); Debra Alise Spungin, Note, *Troubled Waters: Florida's Isolated Wetlands In The Aftermath Of Solid Waste Agency Of Northern Cook County v. U.S. Army Corps Of Engineers*, 26 Nova L. Rev. 371 (2001); Marla E. Mansfield, *"By The Dawn's Early Light:" The Administrative State Still Stands After The 2000 Supreme Court Term (Commerce Clause, Delegation, And Takings)*, 37 Tulsa L. Rev. 205 (2001); Jennifer LaMonte, *Solid Waste Agency of N. Cook County v. U.S. Army Corps Of Engrs., et al.: The Supreme Court Limits U.S. Army Corps Of Engineers' Jurisdiction Over Intrastate Waters That Serve As A Habitat For Migratory Birds*, 9 U. Balt. J. Envtl. L. 78 (2001); Brandon A. Van Balen, Note, *Clearing The Muddy Waters?: An Examination Of SWANCC And The Implications For Wetlands Protection And The Administrative State*, 36 Wake Forest L. Rev. 845 (2001); John W. Broomes, *Navigating In Isolated Waters: Section 404 Of The Clean Water Act Revisited [Solid Waste Agency Of Northern Cook County v. United States Army Corps Of Engineers]*, 531 U.S. 159 (2001)], 41 Washburn L.J. 209 (2001); Timothy S. Bishop and Kermit Roosevelt, *Extrajurisdictional Takings After SWANCC*, 31 ELR 11225 (2001); Joseph J. Kalo, *"Now Open For Development?": The Present State Of Regulation Of Activities In North Carolina Wetlands*, 79 N.C. L. Rev. 1667 (2001); Michael J. Gerhardt, *The Curious Flight Of The Migratory Bird*, 31 ELR 11079 (2001); Michael P. Healy, *Textualism's Limits On The Administrative State: Of Isolated Waters, Barking Dogs, And Chevron*, 31 ELR 10928 (2001); Stanley A. Millan, *The Odd Couple: The High Court's Expansion Of Environmental Standing In Waters But Contraction Of Regulatory Jurisdiction Over Them*, 47 Loy. L. Rev. 729 (2001); Melissa Irr, Note, *United States v. Morrison: An Analysis Of The Diminished Effect Of Congressional Findings In Commerce Clause Jurisprudence And A Criticism Of The Abandonment Of The Rational Basis Test*, 62 U. Pitt. L. Rev. 815 (2001); Peter A. Buchsbaum, *SWANCC: A Retreat From Federal Regulation Of Land Use?*, 33 Urb. Law. 753 (2001); William Funk, *The Court, The Clean Water Act, And The Constitution: SWANCC And Beyond*, 31 ELR 10741 (2001); J. Michael Bays, *New Limits On The Army Corps Of Engineers' Jurisdiction: The Court Throws The Migratory Bird Rule Overboard*, 7 Envtl. Law. 691 (2001); Stephen M. Johnson, *Federal Regulation Of Isolated Wetlands After SWANCC*, 31 ELR 10669 (2001); Robin Kundis Craig, *Navigating Federalism: The Missing Statutory Analysis In Solid Waste Agency*, 31 ELR 10508 (2001); Christy H. Drawl and Jerry J. Phillips, *Commerce By Another Name: Lopez, Morrison, SWANCC, And Gibbs*, 31 ELR 10413 (2001); Maya R. Moiseyev, *Solid Waste Agency Of Northern Cook County v. United States Army Corps Of Engineers: The Clean Water Act Bypasses A Commerce Clause Challenge, But Can The Endangered Species Act?*, 7 Hastings W.-N.W. J. Envtl. L. & Pol'y 191 (2001); Paul Edward Svensson, Note, *The Supreme Court's New Federalism: The Authority Of The U.S. Army Corps Of Engineers Does Not Extend Over Isolated Intrastate Wetlands Under The Migratory Bird Rule*, 19 Pace Envtl. L. Rev. 165 (2001); Jeff Brax, *Supreme Court Guts Clean Water Act Protection Of "Isolated" Wetlands Used By Migratory Birds*, 28 Ecology L.Q. 543 (2001); Tanya M. White and Patrick R. Douglas, *Postponing The Inevitable: The Supreme Court Avoids Deciding Whether The Migratory Bird Rule Passes Commerce Clause Muster Solid Waste Agency Of Northern Cook County v. United States Army Corps Of Engineers*, 9 Mo. Envtl. L. & Pol'y Rev. 9

At the same time, a rich body of case law interpreting the meaning of “waters of the United States” following *SWANCC* has developed because courts are interpreting *SWANCC* differently.¹⁰³ For example, the Fifth Circuit interpreted *SWANCC* as holding that “a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water.”¹⁰⁴ The Ninth Circuit, however, held that tributaries with intermittent flows are still “waters of the United States.”¹⁰⁵ And the Fourth Circuit recently held that “waters of the United States” include distant, non-navigable tributaries of navigable waters.¹⁰⁶

Meanwhile, EPA and the Corps issued an Advanced Notice of Proposed Rule Making suggesting it may be appropriate to revise the regulatory

(2001); Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge To Federalism*, 9 Sup. Ct. Econ. Rev. 205 (2001).

102. See, e.g., *The current regulatory and legal status of federal jurisdiction of navigable waters under the Clean Water Act, in light of the issues raised by the Supreme Court in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99-1178., Before the Committee on Energy and Natural Resources, Subcommittee on Fisheries, Wildlife, and Water, 108th Cong. (June 10, 2003); *Agency Implementation of the SWANCC Decision Before the House Comm. on Government Reform, Energy Policy, Natural Resources, and Regulatory Affairs Subcommittee*, 107th Cong. (2002).

103. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001); *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), *reh'g (en banc) denied*, 263 F.3d 167 (2001); *U.S. v. Interstate General Co.*, No. 01-4513, 2002 WL 1421411 (4th Cir. 2002) (unpublished); *U.S. v. Krilich*, No. 01-2746, 2002 WL 31007698 (7th Cir. 2002), *Cnty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002); *U.S. v. Newdunn*, 195 F. Supp. 2d 751 (E.D. Va. 2002), *U.S. v. Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. 2002), *In re: Needham No. 99-50242* (Bankr. W.D. La. 2001), *aff'd*, *U.S. v. Needham*, 01-1897, 2002 WL 1162790 (W.D. La. 2002), *U.S. v. Rueth Dev. Co.*, 189 F. Supp. 2d 874 (N.D. Ind. 2001) (order vacated in part, February 21, 2002), appeal pending, 7th Cir. No. 02-2045; *U.S. v. Phillips*, (appeal pending) 9th Cir. Nos. 02-30035, 02-30046; *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81 (E.D.N.Y. 2001); *U.S. v. Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001); *Colvin v. U.S.*, 181 F. Supp. 2d 1050 (C.D. Cal. 2001); *U.S. v. Lamplight Equestrian Center*, No. 00-6486 2002 WL 360652 (N.D.Ill. 2002); *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*, 209 F. Supp. 2d 1059 (E.D. Cal. 2002); *U.S. v. Adam Bros. Farming, Inc.*, No. CV 00-7409 CAS (C.D. Cal. 2002); *U.S. v. The New Portland Meadows, Inc.*, No. 00-507-AS (D. Or. 2002); *FD & P Enterprises, Inc. v. U.S. Army Corps of Eng'rs*, No. 99-3500 HAA (D.N.J. 2003).

104. *Rice v. Harken*, 250 F.3d 264, 270 (5th Cir. 2001).

105. *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001).

106. *U.S. v. Deaton*, 332 F.3d 698 (4th Cir. 2003). See also *Treacy v. Newdunn Assocs.* 344 F.3d 407 (4th Cir. 2003) (Finding facts showing that it is “undisputed that water flows intermittently from wetlands on the Newdunn Property through a series of natural and manmade waterways, crossing under I-64, draining into the west arm of Stony Run, and eventually finding its way 2.4 miles later to traditional navigable waters. As the district court found, Stony Run is “navigable-in-fact” because the “lower reaches of Stony Run are subject to the ebb and flow of the tide.” Because there exists a sufficient nexus between the Newdunn Wetlands and navigable waters-in-fact, the Corps’ jurisdiction in this case is amply supported by the Act and the Corps’ regulations under the Act.” *Id.* at 417.)

definition of “waters of the United States.”¹⁰⁷ The agencies sought comment in 2003 on issues associated with the scope of waters subject to the CWA in light of *SWANCC*,¹⁰⁸ and solicited input from the general public, scientific community, federal and state resource agencies on the implications of *SWANCC* on jurisdictional decisions and other changes stakeholders might consider appropriate.¹⁰⁹ Over 135,000 comments were submitted.¹¹⁰ After a public debate over severely narrowed language,¹¹¹ the agencies ultimately withdrew the proposed rulemaking,¹¹² leaving the definition in the hands of the courts (for now). Accordingly, regulators, the regulated community, and those seeking to protect wetlands resources are left with continued uncertainty as to the parameters of jurisdictional waters.

107. Advance Notice of Proposed Rulemaking (“ANPRM”) on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991 (Jan. 15, 2003), *available at* <http://www.epa.gov/owow/wetlands/ANPRM-FR.pdf> (last visited July 25, 2003).

108. *Id.*

109. Specifically, the Corps and EPA are seeking comment on:

- (1) Whether, and, if so, under what circumstances, the factors listed in 33 CFR 328.3(a)(3)(i)–(iii) (*i.e.*, use of the water by interstate or foreign travelers for recreational or other purposes, the presence of fish or shellfish that could be taken and sold in interstate commerce, the use of the water for industrial purposes by industries in interstate commerce) or any other factors provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters?
- (2) Whether the regulations should define ‘isolated waters,’ and if so, what factors should be considered in determining whether a water is or is not isolated for jurisdictional purposes?

68 Fed. Reg. 1994. The level of interest in this ANPRM was so high that the deadline for accepting comments was extended to April 16, 2003. 68 Fed. Reg. 9613 (Jan. 15, 2003).

110. EPA, ANPRM on the CWA Definition of “Waters of the United States,” Docket No. OW-2002-0050, *available at* <http://www.epa.gov/owow/wetlands/swanccnav.html#extension> (last visited July 25, 2003).

111. *See, e.g.*, BNA Daily Environment, *Draft Language Defining U.S. Waters Narrows Clean Water Act Protections*, Nov. 7, 2003 (“Draft wetlands regulatory language defining ‘waters of the United States’ that was drawn up by the U.S. Army Corps of Engineers and the Justice Department would significantly scale back existing regulatory language and was done without input from the Environmental Protection Agency...”); BNA Daily Environment, *Administration Should Rescind Notice On Waters Definition, House Members Say*, Nov. 26, 2003 (“Not only do the January 15 ANPRM and guidance reach far beyond the holding of the *SWANCC* case, they also both apply to the entire Clean Water Act,” the letter from 218 members of the House including about 20 Republicans, said.”) *See also* Felicity Barringer, *U.S. Won’t Narrow Wetlands Protection*, N.Y. TIMES, Dec. 17, 2003, at A35.

112. *See* Corps, *EPA and Army Corps Issue Wetlands Decision*, *available at* http://www.usace.army.mil/inet/functions/cw/cecwo/reg/swancc_release.htm (last visited Feb. 27, 2004). *See generally* Environmental Protection Agency, *Clean Water Act Definition of “Waters of the United States,”* <http://www.epa.gov/owow/wetlands/swanccnav.html> (last visited Feb. 27, 2004).

2. What is a “Discharge?” What Is the Extent of Jurisdiction over Activities in Jurisdictional Wetlands?

Even if a wetland is determined to be a water of the U.S. under the type of analysis described above, not all activities in that wetland would be regulated by the federal government. Unlike several states that regulate all activities in wetlands,¹¹³ Congress did not empower the Corps and EPA with such authority. Instead, Congress only requires permits for “discharges” into navigable waters.¹¹⁴

The task of defining the term “discharge” is complex. Congress defined “discharge of a pollutant”¹¹⁵ to mean: “(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.”¹¹⁶ Accordingly, in order to understand whether an activity is regulated, in addition to understanding what “navigable waters” means,¹¹⁷ one must understand how “pollutant” and “point source” are defined.

In the CWA, Congress defined “pollutant” to include “dredged” material as well as other more traditional pollutants.¹¹⁸ The Corps further defined “dredged material” to mean “material that is excavated or dredged

113. See, e.g., Protected Waters and Wetlands Permit Program, Minn. Stat. Ann. §103G, Minnesota, *available at* <http://www.bwsr.state.mn.us/wetlands/wca/chapter8420.pdf> (last visited July 25, 2003) (“8420.0105 SCOPE. Wetlands must not be drained, excavated, or filled wholly or partially unless replaced by restoring or creating wetland areas of at least equal public value.”); Fill and Dredge in Wetlands, N.H. Rev. Stat. Ann. §§ 482-A:1-482-A:27, *available at* <http://www.des.state.nh.us/wetlands/pdf/482a.pdf> (last visited July 25, 2003) (“No person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from the department.” *Id.* at § 482-A:3).

114. 33 U.S.C. § 1344(a) (2000).

115. Congress included in its definition the plural, “discharge of pollutants.” *Id.*

116. 33 U.S.C. § 1362(12) (2000).

117. See, *supra* section 3(a).

118. 33 U.S.C. § 1362(6). The entire definition reads as follows:

The term ‘pollutant’ means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) ‘sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces’ within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources. *Id.*

from waters of the United States.”¹¹⁹ In other words, discharge of material that comes from the waters of the United States requires a permit, assuming that such discharge comes from a “point source.”¹²⁰

Even the act of “redepositing” soil from mechanized land clearing devices is considered a discharge from a point source.¹²¹ In other words, if a bulldozer or other mechanized equipment picks up earth and puts it elsewhere on a jurisdictional site, it is considered a discharge. In 1986, the Corps issued a rule that expressly exempted from regulation “de minimus, incidental soil movement occurring during normal dredging operations.”¹²² This rule exempted land-clearing operations which removed materials from wetlands, deposited them in an enclosed vehicle, and later removed the materials from the site. This exemption resulted the draining and destruction of thousands of acres of wetlands.¹²³

Following a judicial challenge to dredging activities in North Carolina,¹²⁴ EPA and the Corps issued a new rule in August 1993 requiring Section 404 permits for redeposits of dredged material in waters of the U.S., including jurisdictional wetlands.¹²⁵ Referred to as the “Tulloch Rule” in reference to the original court case,¹²⁶ that rule was successfully challenged by a number of trade associations in the 1998 D.C. Circuit Court decision *National Mining Association v. U.S. Army Corps of Engineers*.¹²⁷ *National Mining Association* concluded that the Corps could not regulate

119. 33 C.F.R. § 323.2(c) (2002).

120. 33 U.S.C. § 1362(14). The definition reads as follows:

The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. *Id.*

Courts have interpreted “point source” to include mechanized land-clearing devices. See *U.S. v. Lambert*, 915 F. Supp. 797 (S.D.W.Va. 1996); *U.S. v. Banks*, 873 F. Supp. 650 (S.D. Fla. 1995), *aff’d*, 115 F.3d 916 (11th Cir. 1997), *cert. denied* 522 U.S. 1075 (1998).

121. *Avoyelles Sportsmen’s League v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

122. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,232 (1986).

123. Marie Genovese, *Implications of the Revocation of the “Tulloch Rule”* available at <http://scholar.lib.vt.edu/theses/available/etd-04282000-15080003/unrestricted/tulloch.pdf> (last visited July 25, 2003); Virginia Institute of Marine Science, Wetlands Program Technical Report, “Tulloch Ditching,” May 1999, available at <http://ccrm.vims.edu/wetlands/techreps/99-4-tullochditching.pdf> (last visited July 25, 2003).

124. *N. Carolina Wildlife Fed’n v. Tulloch*, No. C90-713-CIV-5-B (E.D.N.C. 1992).

125. 58 Fed. Reg. 45,008 (1993), formerly codified in 33 C.F.R. § 323.2(d)(1)(iii).

126. See *Tulloch*, *supra* note 124.

127. *National Mining Ass’n v. United States Army Corps of Eng’rs*, 145 F.3d 1399 (D.C. Cir. 1998).

“incidental fallback,” described by the Court as small amounts of material that fall back to substantially the same place of their initial removal.¹²⁸

Since this 1998 decision, tens of thousands of wetland acres have been targeted for ditching, draining, and destruction, and hundreds of miles of streams have been channelized.¹²⁹ Unlike the *SWANCC* decision, only a handful of law review articles have examined this issue since the court’s ruling.¹³⁰

Some subsequent court decisions interpret *National Mining Association* narrowly. For example, the Fourth Circuit reasoned that:

[E]ven in a pristine wetland or body of water, the discharge of dredged spoil, rock, sand, and biological materials threatens to increase the amount of suspended sediment, harming aquatic life. [Citation omitted.] These effects are no less harmful when the dredged spoil is redeposited in

128. *Id.* at 1403.

129. Sierra Club, *Tulloch Rule*, available at www.sierraclub.org/wetlands/tulloch (last visited July 25, 2003). See also Southern Environmental Law Center, *Tulloch Rule*, available at http://www.selcga.org/Cases/act_tulloch_rule.shtml (last visited July 25, 2003).

130. Corey Elizabeth Burnham, Note, *The Tulloch Rule: Its Rise, Demise & Resurrection. Will the New Version of the Rule Withstand Judicial Scrutiny?*, 33 CONN. L. REV. 1349 (2001); Matthew M. D’Amico, *Be All That You Can Be, But Nothing More: National Mining Association v. U.S. Army Corps of Engineers and the Corps’ Critical Loss of Wetlands Control*, 17 PACE ENVTL. L. REV. 325 (2000); Michael Hollins, Note, *Addition by Removal? National Mining Limits Section 404 Control of Construction in Wetlands*, 14 J. LAND USE & ENVTL. L. 341 (1999); Caleb A. Jaffe, Note, *Tragedy of the Wetlands Commons: What the Virginia Nontidal Wetlands Resources Act Says About the Future of Environmental Regulation*, 20 VA. ENVTL. L.J. 329 (2001); Sam Kalen, *Commerce To Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. REV. 873 (1994); Joseph J. Kalo, *Balancing Administrative Law in North Carolina: A Collection: “Now Open for Development?”: The Present State of Regulation of Activities in North Carolina Wetlands*, 79 N.C. L. REV. 1667 (2001); Michael Lenetsky, *President Clinton and Wetlands Regulation: Boon or Bane to the Environment?*, 13 TEMP. ENVTL. L. & TECH. J. 81 (1994); Bradford C. Mank, *American Mining Congress v. Army Corps of Engineers: Ignoring Chevron and the Clean Water Act’s Broad Purposes*, 25 N. KY. L. REV. 51 (1997); Bryan Moore, Note, *National Mining Association v. United States Army Corps of Engineers: The District of Columbia Circuit Drains Wetlands Protection from the Clean Water Act*, 12 TUL. ENVTL. L.J. 235 (1998); Douglas E. Morrison, *Administrative Law: Clean Water Act: National Mining Association v. Army Corps of Engineers*, 27 ECOLOGY L.Q. 649 (2000); Michael J. Podolsky, *U.S. Wetlands Policy, Legislation, and Case Law As Applied to the Wise Use Concept of the Ramsar Convention*, 52 CASE W. RES. L. REV. 627 (2001); Rachel Schepp, *Deep Trouble for Deep Ripping: Deep Ripping and the Clean Water Act*, 8 WIS. ENVTL. L.J. 225 (2002); Sean A. Scoopmire, *Recent Development in Case Law: D.C. District Court Invalidates the Tulloch Rule*, 6 S.C. ENVTL. L.J. 267 (1997); Vickie V. Sutton, *Wetlands Protection – A Goal Without a Statute*, 7 S.C. ENVTL. L.J. 179 (1998).

the same wetland from which it was excavated. The effects on hydrology and the environment are the same.¹³¹

Courts generally find it appropriate for the Corps to require permits for sidecasting (moving significant volumes of earth around in a wetland) and deep-ripping (dragging four-to seven-foot long metal prongs through the soil behind a tractor or a bulldozer to gouge through a restrictive layer of soil),¹³² holding both are not “incidental” fallback.¹³³

In 2001, EPA and the Corps issued a final rule to clarify the scope of activities that may be subject to Section 404 permits.¹³⁴ The final rule modifies the definition of “discharge of dredged material” and clarifies types of regulable discharges based on the nature of the equipment used by the permittee and agency experience.¹³⁵ The rule creates a presumption that the use of mechanized earth moving equipment in landclearing, ditching, channelization, in-stream mining, or other earth-moving activities in waters of the U.S. require dredge and fill permits.¹³⁶ Activities are generally exempted from this requirement if project-specific evidence shows that the activity results in only “incidental fallback.”¹³⁷ Despite agency efforts to clarify the rule, uncertainty remains about the types of activities that constitute discharges, and the rule is currently on appeal.¹³⁸ It is clear,

131. U.S. v. Deaton, 209 F.3d 331, 336 (4th Cir. 2000). See also U.S. v. Bay-Houston Towing Co., 33 F. Supp. 2d 596 (E.D. Mich. 1999) (finding that the question as to whether defendant’s activities could be characterized as discharge under the CWA created a genuine issue of material fact thereby denying defendant’s motion for summary judgment); Greenfield Mills, Inc. v. O’Bannon, 189 F. Supp. 2d 893 (N.D. Ind. 2002) (“the court concludes that the term ‘discharge of dredged materials’ includes dredging that occurs by means of hydraulics”). But see Froebel v. Meyer, 13 F. Supp. 2d 843 (E.D. Wis. 1998) (finding that a redeposit of sediment did not involve material that had been actively dredged, so there was no discharge of dredged material).

132. Borden Ranch P’ship v. U.S. Army Corps of Eng’rs, 261 F.3d 810 (9th Cir. 2001), *aff’d by* 537 U.S. 99 (2002) (“National Mining Assoc. v. U.S. Army Corps of Eng’rs, 145 F.3d 1399 (D.C. Cir. 1998), upon which Tsakopoulos heavily relies, does not persuade us to the contrary. That case distinguished ‘regulable redeposits’ from ‘incidental fallback.’ 145 F.3d at 1405. Here, the deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit.”). *Id.* at 815.

133. U.S. v. Hummel, 2003 U.S. Dist. LEXIS 5656 (N.D. Ill. 2003) (“There is no dispute of material fact that Defendants dug trenches through the wetland, sidecast the resulting dirt and vegetation, and then redeposited this dredged material into the trenches to cover the new sewer pipes. The Court finds that these activities constitute a ‘discharge of pollutants’ as those terms are defined by the CWA.”).

134. Further Revisions to the Clean Water Act Regulatory Definition of “Discharge of Dredged Material”, 66 Fed. Reg. 4550 (2001).

135. *Id.*

136. *Id.*

137. *Id.* at 4575.

138. *Id.* See ‘Incidental Fallback’ Defined Too Narrowly In Rewritten Tulloch Rule, NAHB Suit Says, 33 DAILY ENV’T REPORT A-2 (Feb. 16, 2001).

however, that ditching and draining of wetlands is subject to severely limited and spotty federal oversight.

III. CONCLUSION: WHAT STEPS CAN WE TAKE TO PROTECT WETLANDS?

In an ideal world, all activities in wetlands (not just discharges) would be federally regulated. Likewise, all wetlands (not just those with surface water connections) would be federally regulated. Such federal regulation would recognize that wetlands are an integral component of the hydrological cycle upon which all life depends. Such federal wetlands regulation would also acknowledge the fact that wetlands are important parts of different ecosystems, and provide appropriate levels of protection not only for the wetlands, but for some adjacent areas as appropriate. Such federal wetlands regulation would recognize and account for cumulative impacts; and at the same time require significant measures to avoid impacts to wetlands; minimize those impacts deemed necessary; and only after such avoidance and minimization require immediate compensation for all lost values and functions.

Recognizing that we do not live in an ideal world, a best-case scenario would have Congress pass legislation to strengthen federal wetlands protections in light of these recent judicial and administrative developments. In fact, during this and recent congressional sessions, a number of bills have been introduced seeking to restore federal wetlands coverage cut back by the recent court decisions.¹³⁹ The likelihood of such

139. See, e.g., Clean Water Authority Restoration Act of 2003, S. 473, 108th Cong. (2003) (which has as its purposes: (1) To reaffirm the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 816) to restore and maintain the chemical, physical, and biological integrity of the waters of the United States. (2) To clearly define the waters of the United States that are subject to the Federal Water Pollution Control Act. (3) To provide protection to the waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution.”); Clean Water Authority Restoration Act of 2002, S. 2780, 107th Cong. (2002) (an earlier version of the current S. 473, which had as its purposes “(1) To provide protection to waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution, including the Commerce Clause, the Property Clause, the Treaty Clause, and the Necessary and Proper Clause of Articles I and IV of the Constitution. (2) To regulate activities affecting the waters of the United States, including intrastate and isolated waters. (3) To restore and maintain the chemical, physical, and biological integrity of the waters of the United States.”); Wetlands and Watershed Management Act of 1997, H.R. 2762, 105th Cong. (Text includes the following amendments: “(a) PROHIBITION OF ACTIVITIES- Section 301(a) (33 U.S.C. § 1311(a)) is amended by inserting after ‘the discharge of any pollutant’ the following: ‘or other alteration of navigable waters’... ‘(d) DEFINITIONS- In this section, the following definitions apply: ‘(1) DISCHARGE OF DREDGED MATERIAL- The term ‘discharge of dredged material’ means any addition of dredged material into navigable waters and includes, without limitation, any addition (including redeposit) of dredged material (including excavated material) into such waters which is incidental to any activity (including

legislation being enacted into law is, however, minimal: none of the bills introduced in recent years has been voted out of Committee.¹⁴⁰ Such inaction is due to the inherent controversies surrounding wetlands protection¹⁴¹ and shows Congress' general inability to reach a consensus on any environmental matter.¹⁴² However, there is growing awareness in Congress of the need to pursue solutions to the current situation.

Given the low probability of reworking CWA Section 404 in the near future, the best way to ensure protection is through strong guidance and regulations from the Administration. However, the Bush Administration has lived up to its anti-environmental reputation¹⁴³ in its treatment of wetlands.¹⁴⁴ For example, the *SWANCC* decision resulted in an agency proposal to narrow the definition of "navigable waters."¹⁴⁵ Likewise,

mechanized land clearing, ditching, channelization, or other excavation) that has or would have the effect of destroying or degrading any area of such waters, including wetlands.").

140. This can be verified by doing a "Bill Summary and Status" report for each of the bills mentioned above on the Library of Congress' Thomas web page, available at <http://thomas.loc.gov/>.

141. As an example of this controversy, EPA and the Corps received over 135,000 comments on their Advance Notice of Proposed Rulemaking. See Docket, *supra* note 110. See also National Association of Homebuilders, *Wetlands*, <http://www.nahb.org/generic.aspx?genericContentID=9008>. National Audubon Society, *Saving Wetlands*, available at <http://www.audubon.org/campaign/wetland/> (last visited July 25, 2003); Sierra Club, *What Will Happen if the Clean Water Act No Longer Protects Many Small Wetlands, Streams and Ponds?*, available at http://www.sierraclub.org/cleanwater/bush_cripple.asp (last visited July 25, 2003). The diversity of viewpoints is also apparent from a quick perusal of the full list of articles published in the National Wetlands Newsletter, Article Index 1979–2002, available at <http://www2.eli.org/nwn/nwnindex.cfm> (last visited July 25, 2003).

142. See Richard J. Lazarus, *A Different Kind of "Republican Moment" in Environmental Law*, 97 MINN. L. REV. 999 (2003); Robert V. Percival, *Separation of Powers, the Presidency and the Environment*, 21 J. LAND RESOURCES & ENVTL. L. 25 (2001). A small number of minor Congressional enactments dealing with environmental issues have passed more recently, including the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107–118, 115 Stat. 2356 (2002). Certain larger bills containing a number of environmental implications have been as well, including the Farm Security and Rural Investment Act of 2002, Pub. Law No. 107–171, 116 Stat. 134 (2002). However, major reauthorizations have usually failed, such as the Endangered Species Recovery Act of 1997, S. 1180. This can be verified by doing a "Bill Summary and Status" report S.1180 from the 105th Congress on the Library of Congress' Thomas web page, available at <http://thomas.loc.gov/>.

143. See, e.g., Sen. Patrick Leahy, Jeffords and Leahy Assail Bush Administration Environmental Record, available at <http://leahy.senate.gov/press/200301/011603d.html> (last visited July 25, 2003); League of Conservation Voters, *The Bush Administration is Rolling Back our Environmental Protections*, available at <http://www.lcv.org/fedfocus/fedfocus.cfm?ID=433&c=5> (last visited July 25, 2003); NRDC, *NRDC Condemns Bush Administration's Policies as the 'Most Serious Threat Ever' to America's Environment at Senate Committee Hearing*, available at <http://www.nrdc.org/media/pressreleases/020307.asp> (last visited July 25, 2003).

144. Sen. Patrick Leahy, *supra* note 143 ("On January 10, 2003, the Administration issued guidelines that could result in the loss of federal protection for up to 20 million acres of swamps and bogs."); See also Natural Resources Defense Council, *The Bush Record – Wetlands*, available at http://www.nrdc.org/bushrecord/water_wetlands.asp (last visited Feb. 27, 2004).

145. ANPRM on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (Jan. 15, 2003), available at <http://www.epa.gov/owow/wetlands/ANPRM->

guidelines for mitigation of allowed adverse impacts on wetlands are weaker than ever,¹⁴⁶ despite a recent National Academy of Sciences study pointing to the failures of existing mitigation measures.¹⁴⁷ In short, on a federal level wetlands are likely to either remain at today's lowered level of protection, or lose even more protections.

Wetlands can, however, receive some increased protections through indirect means. Advocates can continue to challenge unduly narrow interpretations of existing law. Activists can work to enact or strengthen state and local legislation.¹⁴⁸ Those who care about wetlands can work to see that the laws already in existence are properly enforced.¹⁴⁹ Those who are concerned about wetlands also can engage in citizen education and

FR.pdf. (last visited July 25, 2003). See *supra* note 111 for evidence that the Bush Administration was considering a very narrow proposal.

146. Corps, Regulatory Guidance Letter 02-2, *Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899* (Dec. 24, 2002), available at http://www.epa.gov/owow/wetlands/pdf/RGL_02-2.pdf (last visited July 25, 2003); EPA and Corps, *National Wetlands Mitigation Action Plan* (Dec. 26, 2002), available at <http://www.epa.gov/owow/wetlands/pdf/map1226withsign.pdf> (last visited July 25, 2003).

147. Nat'l Acad. of Sciences, Comm. on Mitigating Wetland Losses, Bd. on Environmental Studies and Toxicology, Water Science and Technology Board, National Research Council, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT (2001), available at <http://www.nap.edu/books/0309074320/html> (last visited July 25, 2003).

148. For example, Wisconsin passed state legislation following SWANCC. 2001 WISCONSIN ACT 6, available at <http://www.dnr.state.wi.us/org/water/fhp/wetlands/links.shtml> (last visited July 25, 2003). Furthermore, local ordinances offer strong possibilities for protections. See Thomas E. Slowinski, *Comparison of Federal and Various Local Wetland Regulations in the Chicago Metropolitan Area*, available at <http://www.illinoisenvironmental.com/Presentations/Comparison%20of%20Federal%20and%20Various%20Local%20Wetland%20Regulations%20in%20the%20Chicago%20Metropolitan%20Area.htm> (last visited July 25, 2003). "DuPage County has been regulating wetlands since 1992 under the DuPage County Countywide Stormwater and Flood Plain Ordinance and has significant overlap with the COE wetland permit program. Kane County DEM and Lake County SMC regulate only isolated wetlands. Lake County has recently entered into an Interagency Cooperative Agreement with the COE that will allow SMC to make preliminary jurisdictional determinations throughout Lake County." *Id.*

149. The Bush Administration has been accused of lagging environmental enforcement. See Rockefeller Family Fund, Environmental Integrity Project, *The Withering Away Of Environmental Enforcement: The Bush Administration's Shell Game*, available at http://www.rffund.org/eip/docs/attachment_A.pdf (last visited July 25, 2003); Public Employees for Environmental Responsibility, *Environmental Enforcement Plummets Under Bush: Drop Prior to 9-11 & Further Declines Forecast as Nearly Half of Agents Reassigned* (Jan. 24, 2002), available at <http://www.becnet.org/Bylines/bush.html> (last visited July 25, 2003).

organizing grassroots campaigns.¹⁵⁰ Moreover, we can educate our children about the importance of wetlands.¹⁵¹

It will take hard work to keep our nation's wetlands wet. Nevertheless, remembering Emily Dickinson's words "sweet is the swamp with its secrets,"¹⁵² we must undertake that work to protect the functions and values of wetlands for future generations.

150. For some great examples, see Michael Furtman, *Hung Out To Dry, Wetland Protection in the Wake of SWANCC* (2002), available at http://www.michaelfurtman.com/Wetlands_SWANCC.htm (last visited July 25, 2003).

151. For a good starting place, see Ducks Unlimited, *Teachers Guide to Wetland Activities*, available at <http://www.greenwing.org/dueducator/ducanadapdf/teachersguide.pdf> (last visited July 25, 2003).

152. Emily Dickinson, *Sweet is the swamp with its secrets* (1740), available at <http://www.americanpoems.com/poets/emilydickinson/1740.shtml> (last visited July 25, 2003).